

The First Amendment and the AP, Fox subpoenas



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I have written before about having a plan in place and training for your staff on how to respond to a subpoena. The key points: make certain that the person who receives the subpoena knows to give it immediately to a designated editor or the publisher, recognize that court rules establish a relatively short time for a response, and be prepared to assert the reporter's privilege in a letter to the person sending the subpoena. Train your staff not to agree to testify or provide information to litigants. Those decisions are to be made by management so that the privilege is not waived.

In South Carolina the reporter's privilege is created by a state statute prefaced by a finding by the General Assembly that subpoenas to news organizations interfere with the flow of information to society, a flow that the General Assembly found to be vital in a democracy.

The U.S. Supreme Court has addressed the question of a reporter's privilege arising under the First Amendment, but a divided court in the leading case did not endorse protection for newsgathering in a way that would bind lower courts. Some courts, both federal and state, have interpreted the case of *Branzburg v. Hayes* as recognizing a privilege, but other courts, including the Supreme Court of South Carolina, reached the opposite result.

Interestingly, in South Carolina reporters are protected by a First Amendment privilege in federal court because the Court of Appeals that rules on cases from the South Carolina federal courts has interpreted the Supreme Court decision as creating a privilege against compelled disclosure of information obtained in the newsgathering process. In state court, reporters are protected by the state's shield law.

A key weakness in the protection provided reporters under both the Constitution and shield laws is that these protections do not extend to third parties, such as telephone providers or persons who might have been the source of information.

This weakness is why the United States issued subpoenas to telephone service providers for the Associated Press and Fox News. Telephone companies cannot claim, even in the unlikely event they might be so inclined, a privilege against disclosure on grounds that the phone service was provided to a news organization. Remember this: telephone companies are licensed and regulated by government, thereby reducing the vigor with which any phone company would be willing to resist a subpoena from the government or authorized by a branch of government.

So, did the Justice Department abridge the First Amendment rights of either AP or Fox?

So far, probably not. The government has obtained the phone records showing numbers called or numbers from which calls were received in an effort to identify persons suspected of leaking information to reporters. Of course the fact that the government could obtain the records is likely to chill potential sources of information, but that may not rise to the level of an abridgement of the First Amendment rights of reporters and news organizations. Depending on steps taken by the government—whether directed at reporters or their sources—there may not be any opportunity for either news organization to mount a legal challenge to the subpoenas.

Should any of this change the way to conduct business?

I read a line attributed to Will Rogers that rings true here, “News is reporting what ‘they’ don’t want you to know, the rest is public relations.” We can each recall examples where the government was the source of a leak because the leak served a government purpose (recall the disclosure by Dick Cheney’s chief of staff that Valerie Plame was an undercover CIA agent when that disclosure undermined criticism of the great WMD caper by the Bush administration).

When a leak exposes government failure or ineptness, the government will go to great lengths to interfere with the relationship between reporters and sources, or, in extreme cases try to stop the publication of information obtained from a source. Those of us with mileage recall the Pentagon Papers case where the United States government sought to enjoin the publication of documents revealing the history of decision-making in the Vietnam War.

Some of you may remember a book entitled *Six Days of the Condor*. The central character in the book worked in a bureau of the CIA that read spy novels to keep up with the most imaginative forms of spy tradecraft. Of more recent vintage, *Men in Black* featured supermarket tabloids as journals disclosing the activities of extraterrestrials on earth. My point: develop skills and techniques of communication that will make it more difficult for the government to learn of communications with well-connected sources. Read spy books and adopt techniques that might be useful. Read true crime stories and adopt some of the strategies used by drug dealers, the most common being pre-paid, disposable cell phones. And, by the way, don’t buy the cell phones with your credit card. Use cash.

And when you get a tip, think about ways to use the FOIA to surround the story. You might not get much helpful information if the public body is intent on hiding embarrassing information, but having gotten public records they may serve as cover for your tipster.

Finally, don’t advertise that you have a confidential, strategically-placed, inside source. I know it is good for a reporter’s ego to put such a line in a piece, but it adds nothing to the work and exposes the source to potential disclosure.